

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

No. 37623-7-II

Respondent,

v.

JACK DOUGLAS BOOKER,

Appellant.

UNPUBLISHED OPINION

Sweeney, J. — On a challenge to the sufficiency of the evidence to support factual findings, we ask not whether the court could have made other findings but whether the record supports the findings the court did make. Here, the court found that Vancouver, Washington, police waited several seconds before entering a house after they knocked and announced their presence to execute a search warrant. The court also found that they located the defendant in the kitchen/dining area, after a search of the house, rather than in the entryway of the house. We conclude that both findings are supported by this record and, in turn, support the court’s refusal to suppress the drug evidence seized here. We,

accordingly, affirm the convictions for methamphetamine possession and second degree possession of stolen property.

FACTS

The Clark County sheriff's office asked Vancouver police detective Brian Acee and other members of the interagency Career Criminal Apprehension Team (C-CAT) to arrest Jack Booker for failure to appear on a gross misdemeanor charge of driving under the influence. The C-CAT team normally manages fugitive investigations, habitual offender cases, and other cases as needed by the police department; the team is rarely assigned to apprehend people on warrant status for a misdemeanor. Here, the sheriff's office asked the C-CAT team to make the arrest because one year earlier Detective Acee had executed a search warrant on Mr. Booker's house for firearms and methamphetamine. And they found firearms.

Detective Acee prepared an affidavit explaining that the purpose of the warrant was to arrest Mr. Booker for failure to appear on a gross misdemeanor. The court authorized the search warrant for Mr. Booker at his residence. Ten members of the C-CAT team arrived at Mr. Booker's property to execute the warrant. They encountered a man in the parking area in front of Mr. Booker's house when they arrived. They ordered the man to lie down on the ground, and one of the officers detained him.

The line of police then approached the front door. Mr. Booker had mounted a

surveillance video camera with audio on his house; the camera filmed activity in the parking area and the approach to the front door. Report of Proceedings (RP) at 58-69, 247-54. The officer in the lead position, Detective Acee, knocked on the door and called out something to the effect of “Vancouver Police, search warrant, demand entry.” RP at 23; Ex. 7. They then paused briefly but heard no response from inside. The team leader, Sergeant Michael Chylack, ordered the officers to break down the door and enter the house. An officer first checked the door and found it unlocked. The officers then entered the house through the unlocked door and separated into pairs to “flow” through the home in search of occupants.

The State and Mr. Booker disagree over where and when the C-CAT team located Mr. Booker. Mr. Booker claims he was in the entryway and that the police encountered and secured him as soon as they entered the door. The police say they found Mr. Booker in the kitchen/dining area only after the police first cleared the hallway, the master bedroom, and other areas of the house. They saw a pipe with some residue in the master bedroom.

Detective Gordon Conroy remained outside with the man in the parking lot and ran a check on the license plates for the vehicles on the property. A trailer in the driveway was reported stolen.

Detective Acee gathered Mr. Booker and his family in the living room. He read

Mr. Booker his *Miranda*¹ rights and asked for consent to search the house for drugs and contraband. Mr. Booker refused. However, when asked about the pipe, Mr. Booker said he was no longer using methamphetamine and that he had found the pipe down the street and brought it home to prevent neighborhood children from finding it. And Mr. Booker led police to a revolver he kept in his bedroom.

Detective Acee sought and obtained a second warrant to search Mr. Booker's house for methamphetamine and drug paraphernalia. The police then found baggies, many rounds of ammunition, and a second firearm, among other items.

The State charged Mr. Booker with one count of methamphetamine possession and one count of second degree possession of stolen property. Mr. Booker moved to suppress the drug evidence. He argued that the police violated the knock and announce rule when they failed to wait a reasonable amount of time before entering and that the initial search of Mr. Booker's home violated the scope of the first search warrant. The court denied the motion. A jury ultimately found Mr. Booker guilty of both counts.

DISCUSSION

Substantial Evidence To Support the Findings

Mr. Booker first challenges a number of the court's findings of fact as not supported by the evidence, specifically:

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

- Finding of Fact 4: The surveillance tapes and Sergeant Chylack's testimony undermine the claim that the officer waited "several seconds with no response from inside the house." Clerk's Papers (CP) at 97. In addition, the remainder of the finding, that "[t]he short duration of time between the knock and announce and the entry into the residence was reasonable," is actually a conclusion of law. CP at 97.
- Findings of Fact 5 & 7: These findings assert that the police did not encounter any person in the first rooms that they entered in Mr. Booker's house. However, the video disputes this assertion because it features Detective Acee stating, "Lay down, dude, lay down, lay down," right after opening the front door. Exs. 3 & 7.
- Finding of Fact 6: Detective Acee's trial testimony contradicts that the pipe contained an "off-white crystal substance"; he saw burn residue instead. RP at 89-90. And he testified he did not test the pipe or baggies. RP at 89-90.
- Finding of Fact 11: There was no testimony about the length of time Mr. Booker had the tape, so the record does not support the court's finding that the "[d]efendant had sole custody and control of the video cassette tape for seven months." Moreover, Mr. Booker gave the video cassette to his lawyer, not to the State as the finding indicates.
- Finding of Fact 12: The court's finding that live testimony was more helpful than the tape recording is more of an opinion statement by the court rather than a factual finding. The statement is also inconsistent with other findings in that the court seems to rely on the tape to find that the police waited a few seconds at most before entering Mr. Booker's house. See CP at 100.

We review the findings Mr. Booker challenges for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). That means that we review this record to decide whether the findings the judge made are supported, not whether the judge could have made other findings. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682

(2003); *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). And unchallenged findings are verities on appeal. *Hill*, 123 Wn.2d at 644.

Waiting Time between the Knock and Announce and Entry

The trial court found that the police sergeant gave an order to breach the door after police knocked, identified themselves, and waited “several seconds with no response from inside the house.” CP at 97 (Finding of Fact (FF) 4). Detective Acee testified to that effect. Mr. Booker refers us to the surveillance video and Sergeant Chylack’s testimony to argue that the court’s finding on this is unsupported by this record. But neither the video nor the testimony directly refute that the officers waited at least three seconds before entering. Sergeant Chylack testified: “We didn’t wait long. I said right after he knocked and announced and if we didn’t hear – if I don’t hear anybody coming through the door, since we were compromised, I went to Acee, ‘Go ahead and hit it,’ which meant use the ram.” RP at 162. “Didn’t wait long” and “right after” could just as easily mean “three or more seconds” as “immediately.” In fact, Sergeant Chylack later indicates that he associates “not long at all” with approximately “five seconds, couple seconds.” RP at 172.

The surveillance video is vague. The video appears to make clear that the officers surely did not wait 25 to 30 seconds as Detective Acee reported. But it does not definitively clarify whether the officers waited one second or several seconds before

opening the door to Mr. Booker's house. The camera is facing what looks like a parking lot in front of Mr. Booker's house. It does not offer a view facing the front door.

Instead, the viewer can see the right sides of the members of the C-CAT team as they line up facing the front door. And there are a series of sounds, several of which could be a door opening, before the team files into the house. So while the video directly contradicts Detective Acee's report and testimony that the officers waited 25 to 30 seconds before entering the house, it does not contradict the trial court's finding 4 that the officers waited a shorter period of several seconds before entering. RP at 75; Ex. 7.

Mr. Booker's Location in the House

Mr. Booker also assigns error to findings 5 and 7; both state that police did not find Mr. Booker in the area immediately inside the front door when they entered. Detective Acee, Sergeant Chylack, Corporal Neil Martin, and community corrections specialists Filli Matua and Brian Ford all testified that they did not immediately see or encounter Mr. Booker when they entered the house. Specialists Matua and Ford testified that they found Mr. Booker in the kitchen/dining area. Mr. Booker contends that the video shows conclusively that police found him in the entryway of the house as they entered. He argues from this that there was then no need for police to search the rest of the house for him.

The video shows that a police officer at the front of the queue knocked on the door

and announced the team's identity and purpose. Someone then hollers, "Lay down, dude, lay down, lay down." Ex. 7. But the video does not show whom the officer was speaking to or whether the officer was speaking to anyone in particular. And, while it is tempting to conclude that the police were speaking to Mr. Booker, we will not do so. That was the trial judge's call. *Thomas*, 150 Wn.2d at 874-75. And those findings are supported by other evidence in this record. RP at 35-37, 112-13, 130-31, 151, 165.

Methamphetamine Pipe in the Bedroom

Mr. Booker objects to the portion of finding 6 stating that "[t]he glass pipe [found in the master bedroom] appeared to contain an off-white crystal substance." CP at 98. Detective Acee referred to the search warrant addendum and supporting affidavit and then testified: "The pipe was in plain view and contained an amount of crystalline substance which I recognized to be methamphetamine." RP at 89; *see also* CP at 30. That is substantial evidence to support the trial court's finding.

Helpfulness and Reliability of the Surveillance Tape

Finding of Fact 11 states:

At the 3.6 hearing, the Court viewed the video and audio recording of what appears to show the arrival of the police onto Defendant's property, and the knock and announce at the front door. This tape was admitted as Exhibit 3. This video cassette recording appears to be from Defendant's surveillance system. Defendant had sole custody and control of the video cassette tape for seven months, before turning it over to the State in December.

CP at 99-100.

And Finding of Fact 12 states:

The taped recording is of little value to the Court. There was no evidence offered regarding the recording system or process that was used to create the tape, nor was there testimony to establish the tape's chain of custody to ensure its integrity or protection from tampering or alteration. It is unknown what has been done to the tape for the seven months prior to Defendant relinquishing the tape. In this case, the Court finds live testimony from witnesses more helpful.

CP at 100.

The trial court also handwrote the following in between the typed lines of finding 12: "There was testimony re: the location of one camera. There was testimony that the tape was unaltered." CP at 100.

Several portions of these findings are not supported by substantial evidence. The statements comparing the value of the tape to the value of witness testimony, from the trial court's perspective, are unsupported and are not true findings of fact anyway. And we find no support in the record for the proposition that Mr. Booker had the tape in his exclusive possession for seven months.

Violation Knock and Announce

Mr. Booker next contends that the court erred by concluding that police waited a reasonable time, after they announced their presence and purpose, before entering his house. Here, the trial court concluded:

The police complied with the requirements of the knock and announce

statute, RCW 10.31.040. The short duration of the time between the knock and announce, and the entry into the residence was justified by the officers' belief that they had been compromised by the unexpected encounter with the male in the driveway in front of the house. This was further supported by the knowledge of the police regarding Defendant's history with firearms, reputation in the drug community, and numerous visitors to the property through prior surveillance by the police.

CP at 100.

The court also concluded: "The search warrant was based on probable cause and was executed in a reasonable manner." CP at 101.

We have already addressed whether the pertinent findings of fact here are supported by the record. The question now is whether those findings support the court's conclusion that the officers waited a reasonable amount of time after they announced their presence. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). That is a question of law and so our review is de novo. *State v. Cardenas*, 146 Wn.2d 400, 407, 47 P.3d 127, 57 P.3d 1156 (2002).

The Fourth Amendment to the United States Constitution guarantees a right to privacy against unreasonable searches and seizures. U.S. Const., amend. IV. And Washington Constitution, article I, section 7, protects against intrusions into one's home "without authority of law." One implication of these privacy protections is that police officers must announce their identity and purpose before entering premises to execute a search warrant. *State v. Johnson*, 94 Wn. App. 882, 889, 974 P.2d 855 (1999). The

procedures required by the knock and announce rule, also called the “knock and wait” rule, are codified in Washington state law. RCW 10.31.040.

The statute requires that law enforcement officers knock and announce their identity and purpose, and wait a reasonable period to give occupants an opportunity to voluntarily admit them before entering the premises. *Cardenas*, 146 Wn.2d at 411; RCW 10.31.040. The statute applies whether the police must forcibly enter the property or may enter through an unlocked door. *State v. Richards*, 136 Wn.2d 361, 369, 962 P.2d 118 (1998). Police must strictly comply with the knock and announce rule unless they can show that exigent circumstances exist or compliance would be futile. *Id.* at 372.

The parties do not dispute that the C-CAT team satisfied the “announce” element of the rule: “Detective Acee knocked, and yelled out words to the effect, ‘Vancouver Police, search warrant, we demand entry.’” CP at 97; *see also* Ex. 7.

The challenge Mr. Booker makes is to the trial court’s conclusion that police waited a reasonable period of time before they entered the house after announcing their presence and their purpose. The court found that police waited “several seconds” before entering the house. CP at 97. That finding is binding on us. *Hill*, 123 Wn.2d at 647. Whether that period of time is reasonable given the court’s findings is a question of law. *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000).

The length of time officers must wait before entering a residence depends on the

circumstances of the particular case. *Johnson*, 94 Wn. App. at 890. A period of several seconds can constitute a reasonable waiting period in certain circumstances. *Id.* at 891 (finding a five-to-ten-second delay between knock and forced entry reasonable where police sought easily destroyed drug evidence and heard the suspects moving around inside); *State v. Schmidt*, 48 Wn. App. 639, 740 P.2d 351 (1987) (finding a three-second delay reasonable where police had identified the small shed as a methamphetamine lab by its distinctive odor, barking dogs may have alerted the occupants of the officers' presence, the occupants of the shed had become quiet, and the officers had reason to believe the occupants were armed and/or destroying evidence).

Here, the officers reasonably believed that Mr. Booker had access to firearms. And police encountered a man outside Mr. Booker's house. Whether or not this man was a threat to police because he could warn Mr. Booker of their presence is open to question. But there is ample support for the trial court's finding that the police believed themselves to be compromised by the man's presence just outside Mr. Booker's door. CP at 97; Ex.7.

The police entered the house after only a brief delay to reduce the potential for violence and without destroying any property. *Schmidt* and *Johnson* both feature much smaller buildings than Mr. Booker's house, and the *Schmidt* court in particular reasoned that the occupants could likely hear and respond to the officers' request in a very short

time. *Schmidt*, 48 Wn. App. at 646. A longer response time may be necessary when executing a warrant at a larger house in order to protect the occupants' privacy. *Id.* Still, "the right of privacy is severely limited when the police have satisfied the Fourth Amendment's probable cause and warrant requirements." *Johnson*, 94 Wn. App. at 890. The several-second delay was reasonable given the unexpected encounter with the man in the parking area, the officers' awareness of Mr. Booker's history of firearm possession, and his reputation in the local drug community as a drug debt collector. CP at 97. We conclude that the time they waited was reasonable is supported by the record and the findings here.

Scope of the Search Warrant

Mr. Booker next argues that the search should have ended at the entryway where police found him because once they found him there was no reason to search further into the house. We have, however, already concluded that the trial court's finding that police did not find Mr. Booker in the entryway is adequately supported by this record. *See* RP at 35-37, 112-13, 130-31, 151, 165. And that finding again supports the trial court's conclusion that "[t]he search warrant was based on probable cause and was executed in a reasonable manner." CP at 101.

Detective Acee saw a methamphetamine pipe in plain view. The officers then gathered Mr. Booker and his family members in the living room, requested consent to

search the house, and, when denied, secured a second search warrant that allowed them to search for drug paraphernalia.

Sufficiency of the Evidence Possession of Methamphetamine

Mr. Booker next challenges the sufficiency of the evidence to support possession of methamphetamine. He argues that the State did not offer enough evidence that the glass pipe that was introduced into evidence was the same pipe found in Mr. Booker's master bedroom.

The standard of review for sufficiency of the evidence is very deferential to the trier of fact. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). We first view the evidence in the light most favorable to the State and then ask whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). Mr. Booker also "admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence." *Id.* at 597.

The State had to prove the nature of the substance and the fact of possession. RCW 69.50.4013(1); *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Detective Acee testified: "We seized [the pipe in the master bedroom], we turned it in to Vancouver Police evidence, and then we had it sent up to the crime lab so that the substance could be tested by a scientist at the crime lab." RP at 394. And the crime lab

forensic scientist explained that after he received the pipe from the evidence custodian, he inspected it to ensure that the packaging was still sealed from when it was removed from the premises. He then verified that the pipe admitted as evidence at trial was the same pipe he tested for methamphetamine at the lab. That is sufficient to support the jury's finding that the pipe introduced into evidence was the same pipe seized from Mr. Booker's home.

Statement of Additional Grounds

Mr. Booker also offers four additional assignments of error for our review. He contends that one particular member of the C-CAT team should have testified at the trial and would have contradicted Detective Acee, police used excessive force when executing the search warrant, his trial counsel provided ineffective assistance, the police violated chain of custody principles in handling the evidence, and the judge's evidentiary rulings and decision to hold Mr. Booker in custody until sentencing were unreasonable and prejudicial.

Ineffective Assistance of Counsel

Mr. Booker's argument that a United States marshal on the C-CAT team should have testified at trial and his claim of ineffective assistance of counsel are two different ways of stating the same thing—that his trial attorney provided ineffective assistance by failing to solicit testimony from the United States marshal, who Mr. Booker contends

could have clarified who yelled, “Lay down, dude, lay down, lay down” and could have corroborated Mr. Booker’s claim that he was apprehended in the entryway. To prevail, Mr. Booker must show, first, that his counsel’s performance was deficient and, second, that he was prejudiced by that deficient performance. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defense attorney performs deficiently when his representation falls below an “objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “If either part of the test is not satisfied, the inquiry need go no further.” *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Mr. Booker claims that his trial attorney should have called Deputy United States Marshal Leland Rakoz to testify at trial. We, however, strongly presume that counsel’s conduct of the trial amounted to sound trial strategy. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). And Mr. Booker offers nothing to rebut the notion that his counsel made a strategic decision not to call Marshal Rakoz. Furthermore, Mr. Booker offers only speculation in support of the second prong, that he was prejudiced by his counsel’s failure to call the marshal to testify. He states only that *if* Marshal Rakoz were the person who called out, “Lay down, dude, lay down, lay down,” he, or any other person who made that statement, “was the one who must have seen [Mr. Booker] at the doorway.” Statement of Additional Grounds (SAG) at 2.

Mr. Booker's assertions do not amount to deficient performance. Nor does he show any prejudice. His ineffective assistance claim, therefore, lacks merit.

Excessive Force

The police violate the Fourth Amendment if they use excessive force in accomplishing an arrest. *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000). This court analyzes claims of excessive force during an arrest under the Fourth Amendment's "objective reasonableness" standard rather than under a substantive due process standard. *Brown*, 139 Wn.2d at 774; *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). We evaluate reasonableness

from the perspective of a reasonable officer on the scene, not 20/20 hindsight. It is a standard of the moment as police officers are often forced to make split-second judgments in tense, uncertain, and rapidly evolving circumstances. Moreover, "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."

Brown, 139 Wn.2d at 774 (citation omitted) (quoting *Graham*, 490 U.S. at 396). We must carefully balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *Graham*, 490 U.S. at 396 (internal quotation marks omitted) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

Mr. Booker argues that the officers used excessive force when they: (1) arrived

heavily armed in a 10-person team to execute a warrant on Mr. Booker, who had no violent criminal record; (2) violated the knock and announce rule; (3) executed the search of Mr. Booker's house in an "unruly and destructive" manner; and (4) traumatized Mr. Booker's family members, particularly Mr. Booker's daughter, whom the police apparently found wrapped only in a towel and declined to allow her to dress before gathering her in the living room with the other occupants. SAG at 2.

But the record reflects that the Vancouver police turned to the C-CAT team to execute the warrant because of Mr. Booker's history of firearm possession. The team entered Mr. Booker's house through an unlocked door without damaging the property on entry. And there is nothing to suggest the officers used significant force to detain Mr. Booker. Given the legitimate interest of police to protect their own safety as they execute a warrant supported by probable cause, the officers' behavior here was objectively reasonable. *Graham*, 490 U.S. at 396-97.

Chain of Evidence

Mr. Booker offers a clarification here, rather than a claim for relief. He asserts that the surveillance tape was twice examined by "Viking Video." It is unclear what significance "Viking Video" has to the case. The videographer who testified during the suppression hearing, David Lacey, works for Limelight Video Productions. RP at 189-91. In any case, Mr. Booker's statement here does not constitute a viable ground for

review.

Prejudice of the Court

Mr. Booker appears to raise a claim of judicial misconduct as a due process violation here. He argues that the “judges seemed to have a prejudiced opinion,” as evidenced by unreasonable evidentiary rulings and the decision to hold Mr. Booker in custody until sentencing. Statement of Additional Grounds at 3. We have already analyzed and upheld the validity of the court’s evidentiary rulings. And there is nothing in the record to indicate that Mr. Booker’s incarceration until sentencing prejudiced the outcome of these proceedings.

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Bridgewater, J.

No. 37623-7-II
State v. Booker

Hunt, J.